United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 25, 2005

S.A.M.
TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pacific Maritime Association
Case 21-CA-36465 et al.
International Longshore and Warehouse Union;
International Longshore and Warehouse Union,
Local 13; Marine Clerks Association, Local 63,
International Longshore and Warehouse Union
Cases 21-CB-13718 et al. 524-5096-5000
21-CB-13719 et al. 524-5096-7525
21-CB-13720 et al. 536-2545-1500
548-6030-3330

The Region submitted these Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) cases for advice on whether a collectively-bargained hiring system for filling approximately 3,000 new longshoreman jobs contained a discriminatory employment preference based on union membership, where applicants were ultimately hired through a lottery system open to the general public; that system gave a preference to applicants referred by certain employees a majority of whom were union members but a significant number of whom were non-union employees, foremen and the Employers.[1]

We conclude that the Region should dismiss the allegations that the hiring system constituted an unlawful hiring preference based on union considerations. The employee referral preference in the hiring system was neither exclusively nor explicitly tied to union membership. The parties established a nondiscriminatory business justification for substantially relying upon referrals from

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[1] These cases were also submitted regarding whether this hiring scheme, if unlawful, violated prior orders issued in the Phillips-Gatlin cases where the Board found a different hiring/sponsorship program, discussed in detail, infra, constituted unlawful discrimination. See, ILWU Local No. 13 (PMA), 183 NLRB 221 (1970) ILWU Local No. 13 (PMA), 192 NLRB 260 (1971), NLRB v. ILWU Local No. 13, 1972 WL 3032, 80 L.R.R.M. (BNA) 3213 (9th Cir. 1972), ILWU Local No. 13, 210 NLRB 952 (1974), NLRB v. ILWU Local No. 13, 549 F.2d 1346 (9th Cir. 1977).

current employees. Since additional applications also came from the general public, and the final selection of applicants was made via a lottery system, we conclude that the parties' overall hiring system did not have the foreseeable consequence of encouraging union membership.

FACTS

The International Longshore and Warehouse Union (the Union) is the exclusive collective bargaining representative for a single unit consisting of all longshore workers and marine clerks employed in ports along the Pacific Coast by employer-members of the Pacific Maritime Association (PMA). The PMA is a multi-employer collective-bargaining association whose members are domestic and international ocean carriers, stevedore and marine terminal companies.

The PMA and the ILWU are parties to a collective-bargaining agreement providing for an exclusive hiring hall that dispatches longshore workers and marine clerks to available jobs. Longshore workers are dispatched to positions in the following order of preference: Class A longshore workers, Class B longshore workers, Identified casual workers, and Temporary unidentified casual workers. Class A longshore workers are eligible for full union membership; virtually all Class A employees are full union members. Class B workers are eligible for limited membership, i.e., they have limited voting rights such as voting for the Union president. Casual longshore workers are not members of the Union. Casual workers also are dispatched out of a separate hiring hall and are only eligible for dispatch after all of the available Class A and B workforce has been exhausted.

In early August 2004,[2] the Union and the PMA agreed to hire an additional 3,000 casual dockworkers.[3] The parties agreed to a hiring program which would involve both employee referrals as well as applications from the general public. The parties expected the final pool of applicants to far exceed the number of positions available. The parties therefore devised a hiring program that used a so called "two drum" lottery system, as follows.

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[2] All dates herein refer to 2004 unless otherwise noted.

[3] No one disputes the need for additional longshoremen which was caused by a severe labor shortage and a dramatic increase in cargo traffic.

First, the parties issued an "industry interest" card to certain employees who could give the card to an applicant. Specifically, industry interest cards were given to: all Class A and B workers, each identified casual who worked at least 70% of the average hours in the last six-month period, and all foreman. In addition, 500 industry interest cards were distributed among the PMA member companies. In August 2004, the longshore workforce at the Los Angeles area ports was comprised of approximately 5,200 Class A workers, approximately 1,200 Class B workers, and, approximately 3,900 identified casual longshore workers, of whom approximately 1,800 had worked 70% of the average hours in the last six-month period. The parties eventually obtained a total of 8883 industry interest cards from applicants.

Second, the parties solicited applications from the general public through newspaper advertisements that advised interested individuals to send a postcard with their name, address, and phone number to the Joint Port Labor Relations Committee.[4] The parties estimated that they eventually received at least 200,000-300,000 applicant cards from the public.

The hiring process was accomplished by a "two-drum" lottery system. First, the over 200,000 cards from the public were placed in a drum from which the parties drew 8883 cards to match the number of industry interest applicants. Second, these 8883 public cards were combined with the 8883 industry interest cards and placed in a drum. The parties then drew 3,000 cards to be the initial applicants for the 3000 new dockworker jobs. The Union and the PMA posted the names of these first 3,000 applicants on their website. Ultimately all 17,766 cards were drawn and listed in sequential order for use as alternates or for any future hiring. The drawings were held on August 19. Area arbitrators who serve under the coast-wide collective-bargaining agreement conducted both drawings. Thus, in the second drawing any given applicant with an industry interest card had a 16.8% chance of being one of the first 3,000 selected.

The ILWU and PMA submitted a joint position statement in response to these charges. In general, the Union and the PMA assert that the preference for applicant referrals from

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[4] This Committee, consisting of equal numbers of representatives from both the Union and the Employer, oversees disputes and other issues arising under the collective-bargaining agreement and the operation of the hiring hall.

current employees was in both their interests because applicants who have been referred by individuals with a connection to the longshore industry will have a higher retention rate than those individuals who are submitting "outside" applications.

PMA asserts that it and its member companies incur significant costs in training and processing new casual longshore workers. PMA estimates that it spends approximately $2,900 to process and train each new casual worker. Thus the cost to hire and train 3,000 casual longshore employees will be approximately $8.7 million. PMA notes that because of the substantial cost invested up-front for each individual hired as a casual worker, it has a compelling interest in hiring workers who will be productive and committed to the industry. The ILWU asserts that it has a legitimate interest, as the bargaining representative, in seeing to it that casual workers dispatched from the hall sufficiently perform the work covered by the collective-bargaining agreement. The ILWU asserts that it has an interest in seeing that new hires maintain the standards of the trade union.

The Charged Parties note that in recent years, a large percentage of identified casuals either have failed to show up for dispatch on a regular basis when work is available, or have dropped out of the industry altogether. The Charged Parties assert that between 1997 and 2001, 960 out of approximately 7,000 identified casuals were removed from the list for failure to meet the minimum number of shifts. Identified casuals only need to work one shift every six months in order to remain on the list. The PMA argues that, in addition to incurring lost training and processing costs, the unavailability of casual workers results in significant costs in terms of lost productivity and delays in unloading vessels in the ports.

In addition to the identified casuals who drop out of the industry altogether, many other casuals work close to the bare minimum required to remain on the identified casual list, and otherwise are virtually inactive. According to the Charged Parties, in the months of July and August, during which there were full-time work opportunities for all identified casuals, more than 40% did not work any shifts in most weeks. The Union and the PMA assert that new hires who are referred by employees in the active workforce have a higher likelihood of being more reliable and committed to the industry than applicants without this connection. They argue that workers referred by existing employees generally have a better understanding of the nature and conditions of the casual work they will be performing and will better understand what they are in for.

The Charged Parties further note that reliance on employee referral is a common practice in American industry, citing two internet articles in support of this proposition. In the first article, a survey of 586 human resource professionals found that 65% of companies have either a formal or informal employee referral program.[5] In that survey, almost 70% of respondents said that employee referral programs are more cost-effective than other recruiting methods. In the second article, a study conducted by Ohio State University found that retention rates for employees hired through employee referrals are 25% better than for employees hired through other methods.[6]

The Charged Parties also note that preliminary information from the processing of the 3,000 drawn applicants indicates that referrals from employees in fact had a significantly higher rate of retention compared with applicants from the general public. As of September 17, 78 applicants failed to show up for pre-screening. Approximately 69% of those no-shows were applicants from the general public. In addition, 79% of applicants who have been disqualified for failing to establish proper documentation of their identity or of legal authorization to work in the United States have been applicants from the general public.

ACTION

The Region should dismiss the charges, absent withdrawal. The industry interest card preference in the hiring system was not based on union membership. Although a majority of industry interest cards were distributed to Class A employees who are almost exclusively union members, they were also distributed to the Employers, foremen and employees who either were not union members or were not full union members. The parties established a nondiscriminatory business justification for substantially relying upon employee referrals. Since applications also came from the general public, and final selection of applicants was done via a lottery system, we conclude that the overall hiring system did not have the foreseeable consequence of encouraging union membership.

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[5] See *Word of Mouth Is Best Recruiting Method* (July 2001), at http://www.relojournal.com/july2001/referal.htm.

[6] See *Employee Referral Program Reels 'Em In* (December 14,2001) at http://vault.com/nr/printable.jsp?ch_id=11359988&print=1.

The Board has consistently found that an employer, acting alone, may rely on an established hiring system which gives preference to referrals from the employer's current nonunion employees, as a defense to an alleged discriminatory refusal to hire a union affiliated applicant.[7] Thus, an employer's own hiring process which relies on referrals from existing employees represents a lawful, legitimate, and rational business practice.[8] The instant case, however, does not involve an employer acting alone but rather a hiring agreement between the PMA and the Unions.

An employer-union agreement to a hiring program that explicitly and directly discriminates based on union membership is unlawful.[9] Agreed upon employment hiring preferences explicitly or directly based on union membership violate the Act because they coerce and/or encourage Union membership. For example, where parties have a contractually agreed upon exclusive hiring hall, the union violates

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[7] Brandt Construction Co., 336 NLRB 733 (2001) ("Respondent has shown that it would not have hired the prounion applicants even in the absence of their union activity or affiliation . . . [where] Respondent's established hiring policy was to give hiring preference to . . . applicants recommended by current supervisors or current employees.") See also, Airborne Freight Company, 338 NLRB No. 72, Slip op. at 18 ("A new employer may favor relatives and friends in making hiring decisions. Nepotism, one of the older human social behaviors, does not constitute evidence that the employer is engaging in illegal discrimination.")

[8] American, Inc., 342 NLRB No. 76, slip op. at 6 (2004); Ken Maddox Heating & Air Conditioning, 340 NLRB No. 7, Slip op. at 2 & n.4 (2002)

[9] Bricklayers Local 1, 308 NLRB 350, 351 (1992)(contract provision that requires at least 80% of workforce be union members unlawful; such a term is tantamount to 80% "closed shop."); Local No. 121, Plasterers, 264 NLRB 192, 205 (1982)(contract provision that requires at least 50% of workforce be union members unlawful); Longshoremen ILA Local 846 (Virginia International Terminals), 314 NLRB 809, 810-812 (1994) (union's practice of seeking "port numbers," i.e., employee identification numbers, from the agreed upon contract board in direct proportion to the number of union members it intends it induct to union membership, violated the Act; where employees with port numbers receive preference in employment, restricting distribution of port numbers to union members gives unlawful preference to union membership).

Sections 8(b)(1)(A) and (2) when it operates the hiring hall to discriminate against registrants based on union membership.[10]

Agreed upon employment hiring preferences which are neither explicitly nor directly based on Union membership may still violate the Act if they are sufficiently connected to union membership or affiliation that the foreseeable consequence of that connection is to coerce and/or encourage Union membership. For example, in IATSE Local 659 (MPO-TV of California),[11] the Board found unlawful a contractually agreed upon "Industry Experience Roster" which the union interpreted as according a hiring preference for employees who worked for "me-too signatory" employers. The Board found that the contractual preference prevented an applicant from "obtaining initial employment unless he had prior employment at which he was represented by the Union."[12] The Board found that this preference coerced union membership because it punished applicants who had chosen not to work for employers whose employees were represented by the Union, and rewarded applicants who had chosen to work where they were represented by the Union.[13]

Similarly, in the Phillips-Gatlin cases,[14] the Board and the Ninth Circuit held that the union unlawfully implemented an employee sponsorship hiring program, whereby

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[10] See Longshoremen's Local No. 13, 210 NLRB 952, 956 (1974) (union operating exclusive hiring hall unlawfully conditioned membership in class B upon sponsorship by class A, and eligibility to sponsor was conditioned on union membership), enfd. 549 F.2d 1346 (9th Cir.), cert. denied 434 U.S. 922 (1977).

[11] 197 NLRB 1187 (1972).

[12] Id, at 1189.

[13] See also New York Typographical Union NO. 6 (Royal Composing Room), 242 NLRB 378 (1979)(unlawful preference in recall rights accorded to employees who worked for union signatory employers without regard to whether signatories were members of multiemployer unit).

[14] ILWU Local No. 13 (PMA), 183 NLRB 221 (1970) ILWU Local No. 13 (PMA), 192 NLRB 260 (1971), NLRB v. ILWU Local No. 13, 1972 WL 3032, 80 L.R.R.M. (BNA) 3213 (9th Cir. 1972), ILWU Local No. 13, 210 NLRB 952 (1974), enfd. 549 F.2d 1346 (9th Cir.), cert. denied 434 U.S. 922 (1977).

all applicants for Class B longshore registration in a contractually agreed upon hiring hall were required to be sponsored by a Class A longshoreman. As in IATSE Local 659, supra, an applicant could not gain initial employment as a Class B registrant without an affiliation with the Union, i.e., sponsorship with a Class A longshoreman. Although the union contended in that case that all Class A longshoremen were not union members, the court found that in all but an insignificant number of cases Class A sponsors were union members.[15] Thus the "result of the sponsorship program was to naturally encourage employees seeking sponsors-and other employees as well-to join the Union and serve as loyal members."[16]

On the other hand, a contractual agreement to grant preferential rights that appear to benefit some unionized employees is not per se unlawful where the agreed upon grant is not so connected to union affiliation that it would foreseeably coerce or encourage union membership. For example, in International Longshoremen and Warehousemen Union (Pacific Maritime Association),[17] the Board held that the PMA and ILWU did not unlawfully give a hiring preference to "strikers" (defined as employees engaged in strikes sponsored by labor organizations against non-Association employers) and to the "unemployed" (defined as locked-out employees of non-Association employers) over "casuals." The Board found no evidence that the "strikers" or the "unemployed" were members of unions and that the "casuals" were not union members. The Board also noted that the hiring preference was granted because "strikers" and the "unemployed" were, on the whole, more dependable and better workers than "casuals."[18]

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[15] NLRB v. ILWU Local No. 13, 549 F.2d at 1352.

[16] ILWU Local No. 13, 210 NLRB at 959. The Board thus concluded that the sponsorship program was "calculated to encourage union membership and as such constituted unlawful discrimination within the meaning of Section 8(b)(1)(A) and (2) of the Act." Id.

[17] 172 NLRB 2055 (1968).

[18] Id, at 2055-2056. See also Cyprus Emerald Resources Corporation, Advice Memorandum dated January 22, 1993 (employment preference for laid-off mine workers who were last employed as hourly employees from District 4's geographical jurisdiction found lawful, in part because having worked in District 4's geographical jurisdiction did not literally require that an employee be laid off from an employer with a union contract, and could just as well have

In Pacific Maritime Association (Samuel L. Wells),[19] the Board adopted, in the absence of exceptions, the findings and conclusions of an ALJ who found lawful the so-called "permissive rule" in the parties contractual hiring hall. Under this rule, the children of deceased registered longshoremen and clerks received Class B longshoremen registration ahead of incumbent casuals and other applicants. The vast majority of preferred hirings of children of deceased workers arose from the death of Class A longshore workers, who were union members. However, the rule also applied to the children of deceased Class B registrants, who were nonunion employees. The judge found the rule lawful because there was no evidence that the number of children of non-union Class B deceased registrants was "insignificant."[20] Under the rationale of this case, more than an "insignificant" amount of non-union participation in a hiring preference would appear to shield that preference from a finding of discrimination based on union membership.[21]

Here, we conclude that the parties' agreed upon preference to employee referrals is not Union based and does not otherwise encourage or discourage union membership. First, we note that the parties' hiring system here is clearly distinguishable from unlawful hiring hall referral systems which explicitly discriminated based on union membership. Although this hiring system gives a preference to referrals from Class A employees who are full union members, it also gives the same preference to referrals from nonunion employees, foremen and the Employers. The preference is thus based on employee status not union membership. In addition, applicants from the public were equally represented in the final lottery pick.[22] The

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meant that the applicant's last job was simply within the geographic boundaries of District 4).

[19] Case 20-CA-18024; Case 20-CB-5813; JD-(SF)-53-84 (1984).

[20] Id., slip. op. at p. 9. See also, Pacific Maritime Association, ILWU Local 19, Advice Memorandum, Case 19-CA-22278 et al., issued December 29, 1992 citing the Sam Wells decision and finding a similar rule lawful.

[21] In contrast, in the Phillips-Gatlin cases, supra, the preference was found unlawful in part because Class A sponsors were union members in all but an insignificant number of instances.

[22] Compare cases cited at notes 8 and 9, supra.

parties' system thus did not select job applicants explicitly or directly based on union membership. Second, to the extent this hiring system relies upon employee referrals, the Board has approved employee referral hiring decisions even where, unlike here, all of the employees who referred applicants were not union members. As in those cases, and in contrast to Gatlin,[23] the parties here have adduced nondiscriminatory business reasons for the employee referral portion of their hiring system. The parties also substantiated their business reasons with evidence of the initial success of the instant program's reliance on employee referrals. The only question remaining, therefore, is whether the hiring system in this case has so close a connection to union membership and/or affiliation that it unlawfully encouraged union membership.

Although applicants referred by union members had a significantly higher chance of being selected for hire than applicants from the general public, the same advantage was enjoyed by any applicant with an industry interest card. Thus, the preference is connected to employees status not union membership. Further, in the second drawing any single applicant with an industry interest card had only a 16.8%, chance of being selected as one of the first 3,000 names. This hiring system is thus far less connected to union membership than systems found lawful because they include more than an insignificant number of nonunion applicants.[24] Thus, we find the connection to union affiliation here insufficient to encourage membership in the Union.[25]

In sum, where union members enjoyed only an enhanced probability that their referrals would be employed, and the parties otherwise demonstrated a nondiscriminatory business reason for substantially relying upon employee referrals, we conclude that the instant hiring system would not have the foreseeable consequence of unlawfully encouraging membership in the Union.

B.J.K.

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[23] ILWU Local No. 13, 210 NLRB at 959.

[24] Compare ILWU (Pacific Maritime Association) and PMA(Samuel Wells), supra.

[25] We also conclude that the Union's agreement to this system did not breach its "duty of fair representation" in violation of Section 8(b)(1)(A). The Union did not act arbitrarily but rather demonstrated a valid basis for agreeing to this system.